Supreme Court, U.S.
FILED
07-472 OCT 5 - 2007
OFFICE OF THE CLERK

No. (1)

In The

Supreme Court of the United States

EVGUENI POJILENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when determining the "reasonableness" of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances?

2. Does a sentencing judge properly take into account the factors listed in 18 U.S.C. §3553(a)(1), as required by *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 127 S.Ct. 2456 (2007), when in his statement of reasons there is no mention of the favorable history and characteristics of a defendant presented at resentencing?

3. At a resentencing pursuant to *United States v. Booker*, 543 U.S. 220 (2005), may the district court consider evidence of post-sentencing rehabilitation for a defendant who had been incarcerated over two years before resentencing?

LIST OF ALL PARTIES

The caption of the case in this Court contains the name of all parties (Petitioner Pojilenko and Respondent United States). Petitioner had nine co-defendants in the district court, but none are involved in this appellate proceeding.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Evgueni Pojilenko respectfully requests that a writ of certiorari issue to review the judgment of the Third Circuit Court of Appeals in this case.

OPINIONS BELOW

The Third Circuits' Not Precedential Opinion was filed on April 17, 2007 and is reported at 222 Fed. Appx. 232 and 2007 WL 1133217 and reproduced in the Appendix at pp. 2-6 to this Petition. On July 16, 2007, the Third Circuit issued an Order denying a Petition for Rehearing with the suggestion for a Rehearing *En Banc*. This Order is reproduced in the Appendix to this Petition at pp. 15-16. The sentencing decision of the District Court rendered on January 18, 2006 is reproduced in the Appendix to this Petition at pp. 7-14.

STATEMENT OF JURISDICTION

The Third Circuit denied Petitioner's timely Petition for Rehearing *En Banc* on July 16, 2007. (App. 15-16). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Court of Appeals had jurisdiction under 18 U.S.C. §3742(a) and 28 U.S.C. §1291. The District Court had jurisdiction under 18 U.S.C. §3231.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§3553(a), (c): Imposition of a Sentence

(a) *Factors to be considered in imposing a sentence.* –

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to §994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under §994(p) of title 28); and

(ii) that, except as provided in §3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to §994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under §994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to §994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have

yet to be incorporated by the Sentencing Commission into amendments issued under §994(p) of title 28);

(B) that, except as provided in §3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoided unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) *Statement of reasons for imposing a sentence.* –

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the

event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * *

U.S.S.G. §5K2.19, *Post-Sentence Rehabilitation Efforts* (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for downward departure when resentencing the defendant for that offense.

STATEMENT OF THE CASE

This Petition arises from a resentencing pursuant to *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Pojilenko*, 416 F.3d 243 (3d Cir. 2005).

In 2002, Petitioner was indicated by a grand jury sitting in the Eastern District of Pennsylvania. The Indictment charged essentially that Petitioner and his nine co-defendants committed various offenses including robbery, extortion, insurance fraud and distribution of controlled substances by and through an organization with which they were associated called the "KGB" or "KGB Enterprise." On June 26, 2003, Petitioner was convicted by a jury of RICO-conspiracy, RICO-substantive, extortion, conspiracy to distribute a controlled substance and possessing with intent to distribute a controlled substance. On November 6, 2003, Petitioner was sentenced to serve 168 months incarceration based upon a United States Sentencing Guideline range of 135 to 168 months. Petitioner appealed the sentence to the Third Circuit Court of Appeals which issued an Opinion on July 27, 2005 vacating the sentence. 416 F.3d 243. The Court of Appeals held that the calculation of the sentencing guidelines was incorrect because a two (2) offense level enhancement for use of a minor in the commission of the offense should not have been applied to Petitioner. The Third Circuit remanded for resentencing only in accordance with its Opinion and *United States v. Booker*, 543 U.S. 220 (2005).

A resentencing hearing was held in the district court on January 18, 2006 (App. 7-14). The District Judge correctly calculated the guideline range to be 108 to 135 months based upon an offense level of 31 and a Criminal History Category of I (App. 9).

Before resentencing on January 18, 2006, Petitioner submitted a detailed sentencing memorandum with exhibits containing eleven letters regarding his good character, a letter from Petitioner expressing his remorse and a letter from a psychologist who interviewed Petitioner during his incarceration and concluded that he had accepted responsibility for his crimes and was remorseful. These matters were brought to the attention of the sentencing judge because Petitioner had been incarcerated in excess of two (2) years from the date of the first sentencing to the date of the resentencing and three (3) years and nine (9) months from the date of arrest.

The District Judge varied upward from the corrected guidelines range and reimposed the 168 month sentence. (App. 12-13). This sentence is 33 months higher than the upper end of the applicable guideline range of 108 to 135 months. In reimposing the 168 month sentence, the District Judge justified the sentence by focusing on the facts of the case brought out at trial and the first sentencing hearing on November 3, 2003. He basically used only these facts when considering the factors contained in 18 U.S.C. §3553(a). Immediately before imposing sentence, the District Judge said: "The Court has reviewed the notes of testimony of the sentencing hearing. We've reviewed the testimony that was presented at the trial in this matter . . ." (App. 10). He then applied these facts only to the factors listed in §3553(a). After doing so, the District Judge noted that he is compelled to conclude that a sentence

should be imposed on Petitioner of 168 months. (App. 12). The fact that the District Judge relied exclusively on trial facts in deciding on the sentence is reinforced by his statement: "I think that the sentence is entirely reasonable, given what I heard in the courtroom over two weeks." (App. 12). There was no finding by the District Judge in varying from the federal sentencing guidelines that there were extraordinary circumstances present to support the sentence imposed. The District Judge merely used the word "reasonable" to describe the sentence given in view of the facts noted to support the sentence.

Before imposing sentence the District Judge stated that he had read Petitioner's sentencing memorandum with the attached exhibits and had read Petitioner's letter. (App. 9). The only other evidence in the record to show that the Judge reviewed these items in formulating the final sentence was the use of the vague phrase, "all factors being considered," after stating that he has concluded that a sentence lower than the one imposed back on November 3, 2003 would not be reasonable. (App. 12).

It is apparent on this record that at resentencing the District Judge did not take into account the history and characteristics of Petitioner since the date of his original sentencing on November 3, 2003, a period in excess of two (2) years of Petitioner's life. As an afterthought and after stating the sentence to be imposed, the Judge noted: "I'm sure, or at least I hope, Mr. Pojilenko, that you have made strides in rehabilitation." (App. 12).

The evidence of post-sentencing rehabilitation was not taken into account at all by the District Judge in resentencing Petitioner. 18 U.S.C. §3553(a)(1) provides that the court shall consider in determining the sentence the history and characteristics of the defendant. The reasons given by District Judge here in imposing a sentence thirty-three (33) months higher than the top of the guidelines belie any notion that the favorable history and characteristics of Petitioner as presented by the defense at resentencing were considered.

On appeal, the Third Circuit held that the District Court properly considered the sentencing factors under 18 U.S.C. §3553(a) and that the sentence imposed was reasonable.

REASONS FOR GRANTING THE WRIT

1. **By Granting Certiorari On June 11, 2007 In *Gall v. United States*, No. 06-7949, This Court Will Resolve The Important Question Of Whether It Is Appropriate, In The Wake Of *Booker*, To Require That Sentences Which Deviate Substantially From The Guidelines Be Justified By Extraordinary Circumstances. Petitioner's Sentence Also Included A Substantial Deviation And Should Be Governed By This Court's Decision In *Gall v. United States*.**

In the Opinion Below, the Third Circuit found the District Court's sentence to be reasonable by properly considering the sentencing factors in 18 U.S.C. §3553(a). However, the sentence imposed on Petitioner was a substantial deviation from the Federal Sentencing Guidelines because it was thirty-three (33) months higher than the top of the applicable range. There was no finding by the Third Circuit that this variance from the guideline's recommendation was supported by "extraordinary circumstances." By granting certiorari in *Gall v. United States*, 446 F.3d 884 (8th Cir. 2006), *cert. granted*, June 11, 2007 (No. 06-7949), this Court has acknowledged that the appropriate level of scrutiny that courts of appeals should apply when determining the "reasonableness" of sentences that vary from the applicable Guideline range imposed by district courts requires review and clarification. Specifically, after *United States v. Booker*, 543 U.S. 220 (2005), it is important to clarify

whether district courts are required to make extraordinary justifications when they elect to depart from the Guidelines. The fact that in *Gall* the sentence varied downward and in Petitioner's case it varied upward should not make any difference in determining whether there is a requirement of a finding of "extraordinary circumstances" in order for the sentence to be deemed reasonable on review by a court of appeals.

Gall is a suitable case to resolve the post-*Booker* issue of whether to require that sentences which deviate substantially from the Guidelines be justified by extraordinary circumstances. Accordingly, on this issue the petition for writ of certiorari in this case should be held pending this Court's decision in *Gall*. However, this petition raises other important sentencing questions under *Booker* and *Rita v. United States*, 127 S.Ct. 2456 (2007). Should this Court determine that plenary review is appropriate in this case, the matter covering the *Gall* issue would be governed by this Court's decision in *Gall*. The matter involving the requirement of a district court to cover in its statement of reasons for imposing a sentence the favorable evidence of a defendant's post-sentencing rehabilitation is a separate issue which should be clarified by this Court on plenary review.

2. This Court Should Clarify Under The *Booker* And *Rita* Decisions The Extent To Which A Sentencing Court Is Required To Include In Its Statement Of Reasons For Imposing A Particular Sentence Evidence Of Post-Sentencing Rehabilitation And Resolve A Circuit Split On The Relevance Of Such Evidence At Resentencing.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the Federal Sentencing Guidelines are advisory and that all sentencing factors set forth in 18 U.S.C. §3553(a), including the Guidelines, be given proper consideration. The Third Circuit set out its requirements to implement *Booker* in *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006). The guidance given in *Cooper* is now modified by this Court's decision in *Rita v. United States*, 127 S.Ct. 2456 (2007), which held that neither the Sixth Amendment right to a jury trial nor the federal statute governing sentencing, 18 U.S.C. §3553(a), is violated by the courts of appeals use of a presumption of reasonableness for a sentence imposed within the range recommended by the Federal Sentencing Guidelines.

In *Rita*, this Court sought to clarify the legal sufficiency of reasons a district court should provide in setting forth the required statement of reasons for imposing a sentence. "The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' argument and has a reasoned basis for exercising his own legal decision-making

authority." *Id.* at 2468. "Where the defendant or prosecutor presents non-frivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments." *Id.* It is respectfully submitted here that if a judge mentions at resentencing that he has read the favorable evidence of a defendant's post-sentencing rehabilitation and makes no further reference to it when reviewing the sentencing factors under 18 U.S.C. §3553(a) and imposing the sentence, this treatment of a defendant's evidence renders insufficient the statement of reasons and the sentence becomes *per se* unreasonable.

Petitioner was incarcerated for a period in excess of two (2) years from the date of the first sentencing to the date of resentencing and three (3) years and nine (9) months from date of arrest. Favorable evidence of his post-sentencing rehabilitation was critical at resentencing and was relevant as part of the history and characteristics of the defendant under 18 U.S.C. §3553(a)(1). As an afterthought and after stating the sentence to be imposed, the District Judge noted: "I'm sure, or at least I hope, Mr. Pojilenko, that you have made strides in rehabilitation." (App. 12). The Judge also used the vague phrase, "all factors being considered," after stating that he has concluded that a sentence lower than the first one imposed would not be reasonable. (App. 12). However, as the attached Opinion of the Third Circuit recognizes (App. 6), the District Court did not directly address the new evidence of remorse and rehabilitation when

imposing sentence. On this record, there is no evidence of meaningful consideration by the District Court of Petitioner's post-sentencing rehabilitation.

Moreover, under *Booker*, the sentencing court is required to impose a sentence taking into account all factors listed in U.S.C. §3553(a). The first factor listed in §3553(a)(1) includes the history and characteristics of the defendant. There is no restriction in this provision limiting information about a defendant to the time period before the first sentencing. This provision directly conflicts with Policy Statement U.S.S.G. §5K2.19, which prohibits at resentencing consideration of post-sentencing rehabilitation efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense. The Policy Statement also conflicts with 18 U.S.C. §3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of the person convicted of an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence.")

There is also a split in the Circuits on whether post-*Booker*, evidence of post-sentencing efforts while incarcerated is relevant at resentencing. In *United States v. Worley*, 453 F.3d 706 (6th Cir. 2006) and *United States v. Re*, 419 F.3d 587 (7th Cir. 2005), the Courts held that such evidence is not relevant. In *United States v. Lloyd*, 469 F.3d 319 (3d Cir. 2006), the Court said while it essentially agreed with the two other Circuits, it would not hold that a court

never could consider a defendant's post-sentencing rehabilitation efforts at resentencing. In unusual cases, such evidence could be considered.

Without guidance from this Court on the points raised in the second reason advanced for granting the writ, district courts may not carry out their statutory obligation to satisfy the appellate court that all relevant evidence was considered before a sentence was imposed. This obligation can only be followed by a requirement that a district court cover in its statement of reasons for imposing a sentence why favorable evidence presented on behalf of a defendant was or was not persuasive. Merely stating that the court read the information provided is not the equivalent of meaningful consideration of a factor listed in 18 U.S.C. §3553(a).

Once again, plenary review by this court of the matters raised under the second reason for granting the writ is necessary.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 5, 2007

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1354

UNITED STATES OF AMERICA

v.

EVGUENI POJILENKO,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 02-cr-00254-2)
District Court: Hon. R. Barclay Surrick

Submitted pursuant to Third Circuit LAR 34.1(a)
January 8, 2007

Before: McKEE, AMBRO and FISHER, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from The United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on January 8, 2007.

On consideration whereof, it is hereby ORDERED AND ADJUDGED by this Court that the sentence entered January 20, 2006, be hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: April 17, 2007

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1354

UNITED STATES OF AMERICA

v.

EVGUENI POJILENKO,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 02-cr-00254-2)
District Court: Hon. R. Barclay Surrick

Submitted pursuant to Third Circuit LAR 34.1(a)
January 8, 2007

Before: McKEE, AMBRO and FISHER, *Circuit Judges*

(Opinion filed: April 17, 2007)

OPINION

McKEE, *Circuit Judge.*

Evgueni Pojilenko appeals his conviction on five counts charging RICO-conspiracy, RICO-substantive offenses, extortion, possession with intent to distribute a controlled substance and conspiracy to distribute. For the reasons that follow, we will affirm.

Inasmuch as we write primarily for the parties, we need not set forth a detailed factual or procedural background. It is sufficient to note that Pojilenko disputes his sentence based on the district judge's failure to meaningfully consider new evidence of his remorse and rehabilitation which occurred in the two year period between his original sentencing and the re-sentencing hearing, ordered on remand from this Court in accordance with *United States v. Booker,* 543 U.S. 220 (2005).

Following the Supreme Court's decision in *Booker,* it is clear that the Sentencing Guidelines are advisory. *Id.* at 245. Moreover, given our post-*Booker* jurisprudence, it is equally clear that the sentencing court may make factual determinations in applying the Guidelines so long as the resulting sentence is reasonable and the sentencing factors set forth at 18 U.S.C. § 3553(a) are given proper consideration. *See United States v. Cooper,* 437 F.3d 324, 329-30 (3d Cir. 2006).

Our inquiry is therefore limited to determining if the sentencing court properly considered the sentencing factors under § 3553(a); and if so, whether the resulting sentence is reasonable.

> The question is not how we ourselves would have resolved the factors identified as relevant by § 3553(a) . . . nor what sentence we ourselves ultimately might have decided to impose on the defendant.

Cooper, 437 F.3d at 330 (citation omitted). This is because the sentencing court is in the best position to determine the appropriate sentence in light of the particular circumstances of the case. *See id.* We must therefore decide whether the District Court imposed the sentence it did for reasons that are logical and consistent with the factors set forth in § 3553(a). *Id.* at 329.

In imposing Appellant's sentence, the District Court considered the Guidelines, but clearly did not treat them as mandatory. Stating that the Guidelines suggest a sentence of 108 to 135 months, the Court nonetheless found that a lower sentence than originally imposed was not appropriate given the seriousness of Appellant's crimes, even after considering "all factors." The Court explained its concern for the protection of the public, as well as the need to deter others from the "chilling" activities engaged in by Appellant and the organization he was affiliated with, including a "brutal beating" and robbery of one individual and the robbery of two others, as well as the possession with intent to distribute controlled substances, among other things.

"Although a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range, a within-guidelines

sentence is not necessarily reasonable *per se.*" *Cooper,* 437 F.3d at 331. The resulting sentence of 168 months, although lengthy, was certainly not unreasonable. It is clear from the transcript of the sentencing proceeding that the sentencing court properly applied § 3553(a), and considered the factors the court deemed relevant to Appellant's circumstances and background, as well as the characteristics of the offense.

Appellant suggests, without citation, that to meet the new reasonableness standard under *Booker,* a sentencing judge should be required to consider current information on the factors listed in § 3553(a). He points out that his Presentence Report was not updated to reflect new information reflecting his newfound remorse and the steps he was taking to obtain his G.E.D. Nonetheless, Appellant was permitted to present this information to the Court through Appellant's Sentencing Memorandum and its accompanying exhibits that contained eleven letters regarding his good character, a letter from Appellant expressing his remorse, and a letter from a psychologist who interviewed Appellant during his incarceration and concluded that Appellant had accepted responsibility for his crimes. After listening to an oral presentation by Appellant's counsel and his proffer of the Memorandum, the judge indicated: "I have read that memorandum and I have read all of the exhibits that were attached to it."

Appellant claims that there is no evidence that the judge gave consideration to the recent, relevant

information about Appellant's history and characteristics. That claim is inconsistent with the record. While the judge did not directly address the new evidence of remorse and rehabilitation when imposing sentence, he did indicate that he had read the materials presented by Appellant, that he understood the guidelines suggested a sentence of between 108 to 135 months, and that "all factors being considered," in light of the seriousness of Appellant's crimes he was compelled to impose the original sentence.

Having reviewed the record as a whole, we conclude that the Court adequately considered the § 3553(a) factors and reasonably applied them to the circumstances here. We therefore find the sentence was reasonable.

For the reasons set forth above, we will affirm the judgment of sentence.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:
	: Criminal Action 02-254-2
v.	: Philadelphia, PA
	: January 18, 2006
EVGUENI POJILENKO,	: 3:06 p.m.
Defendant.	:

TRANSCRIPT OF RE-SENTENCING HEARING
BEFORE THE HONORABLE
R. BARCLAY SURRICK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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* * *

Colloquy

[2] THE COURT: Okay, we have the case in United States vs. Evgueni Pojilenko, it's number 2-254-2. Counsel, please identify yourselves for the record.

MR. SLOMSKY: If Your Honor please, Joel Slomsky. I represent Mr. Pojilenko.

MR. EHLERS: And Your Honor, Mark Ehlers on behalf of the United States.

MS. FOULKES: And Andrea Foulkes, also on behalf of the United States.

THE COURT: Okay. We have Mr. Pojilenko here for re-sentencing. There is an interpreter. Mr. Finney, will you please swear the interpreter.

(Interpreter sworn)

THE COURT: Okay. Counsel, the defendant, Mr. Pojilenko, was sentenced originally back on November 6th, I think it was 2003. The Third Circuit has remanded this case for sentencing in accordance with *Booker*. The Third Circuit specifically found that we had misapplied the guidelines, increasing the offense level by two levels, because of what the Court perceived as a participation of Leonid Kadomsky, a minor. The Court said that that was inappropriate and we're here to resentence Mr. Pojilenko.

The guidelines at the time of the first sentencing had an offense level of 33 and a criminal history category of 1. The guideline was 135 to 168 months. I sentenced Mr. [3] Pojilenko to the very top of the sentencing guideline range, 168 months.

With the adjustments that have been directed by the Third Circuit, the offense level would be 31, the criminal history category would still be a 1, and the guidelines at this juncture based upon what the Appellate Court has said, would be 108 to 135 months.

These guidelines are adversary [sic] only, but I will consider them in determining what is an appropriate sentence, what is a reasonable sentence as *Booker* has dictated.

* * *

[8] THE COURT: All right. Under the circumstances, I'm going to conclude that the sentencing guidelines in this matter, based upon the criminal history category of 1, and the offense level of 31, are 108 to 135 months. . . .

* * *

[9] Mr. Slomsky, I'll hear whatever more you want to say on behalf of your client.

MR. SLOMSKY: If Your Honor please, I have submitted to the Court a detailed sentencing memorandum and –

THE COURT: I have read that memorandum and I have read all of the exhibits that were attached to it.

* * *

[24] THE COURT: All right. Counsel, do you want to bring your client forward and I'll hear whatever he has to say.

Mr. Pojilenko, I'm going to impose sentence on you in just a few minutes. Before I do that, I'll hear anything you want to say.

MR. POJILENKO: Your Honor, everything, in general, everything that I want to say now I put in the letter dated September the 17th which I've written to Your Honor.

THE COURT: All right. I have read that letter, Mr. Pojilenko. Is there anything more you want to say at this point?

MR. POJILENKO: I think that what I expressed in my letter, the way of my thinking, and my feelings that I expressed in the letter, they have not changed since the time I've written the letter. And I don't think that they gonna change in the future.

THE COURT: All right. Just remain right there, counsel.

The Court has reviewed the notes of testimony of the [25] sentencing hearing. We've reviewed the testimony that was presented at trial in this matter. At the last sentencing hearing, the Court made the observation that Mr. Pojilenko was a major participant in extortion, robbery, distribution of illegal drugs. That he was in fact the enforcer for this KGB organization. And I also made the observation at that time that the participants in this KGB appear, based upon the tapes that were played and testimony that was heard, enjoyed the unlawful activity that they were engaged in.

As Mr. Ehlers has recounted, I observed the testimony during the course of that trial was chilling. The evidence of the defendant's participation in these

activities was overwhelming. And I imposed a sentence at that time of 168 months, and I made the observation that I felt that that sentence fit the crime that had been committed, or the crimes that had been committed.

Of course, the guidelines provided that sentence at the upper range. But if you read my statement at the time, I think you can see that it reflects my feeling about the crime, crimes that were committed here.

Mr. Pojilenko engaged in a brutal beating and robbery of Mr. Ulissi, a robbery of Ms. Drissell and Ms. Baldwin. He participated in collection of credit by extortion, in participation in distribution of possession with intent to distribute controlled substances. Those are only the few of the [26] things that came out during the course of the trial.

I have to determine what is a reasonable sentence. *Booker* has told me at this point the guidelines should be considered, but decide what's reasonable under the circumstances.

The guidance that we get from 3553 is essentially the same guidance that I mentioned back at the time of the original sentencing. The sentence has to be sufficient but not greater than necessary, I have to consider the nature of the offenses and the nature of the defendant that's standing in front of me. It has to reflect the seriousness of the offenses. It cannot depreciate the seriousness of the offenses. And it must promote respect for the law.

I concluded originally that a sentence of 168 months was necessary as punishment, to act as a deterrent, to protect the public. And at this juncture, I am convinced that that sentence that I imposed on November 6th, 2003 of 14 years in jail was a perfectly appropriate sentence for the activity that had been engaged in. I understand that the guidelines now say 108 to 135 months. I'm considering that. But I cannot conclude that a sentence lower than a sentence that I imposed back in November of 2003 is reasonable, all factors being considered.

So, I am compelled to conclude that a sentence should be imposed on Mr. Pojilenko of 168 months in jail, four years of supervised release, no fine, and the requirement to pay the [27] special assessments. I think that that sentence is entirely reasonable, given what I heard in the courtroom over two weeks. I'm sure, or at least I hope, Mr. Pojilenko, that you have made strides in rehabilitation. But at this juncture, I'm satisfied that that is an appropriate sentence.

Counsel, is there anything more you want to say before I impose that sentence formally?

MR. SLOMSKY: No, Your Honor.

MS. FOULKES: Nothing further, Your Honor.

THE COURT: All right. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that you, Evgueni Pojilenko, be committed to the custody of Bureau of Prisons, to be incarcerated

for a period of 168 months on each of the counts of the indictment to run concurrently with each other.

I am satisfied that that is a perfectly reasonable sentence.

Upon your release, you are placed on supervised release for a period of four years. Specific conditions of supervised release are that you're not to possess controlled substances, you're not to possess firearms, you're not to violate any state, federal or local laws, and if in fact you are deported from this country, you are not to return to this country unless and until you do so with lawful authority.

You're to pay the special assessments of $500 and you [28] are to stand committed until that sentence is complied with.

Mr. Pojilenko, do you understand the sentence that I've just imposed?

MR. POJILENKO: Yes.

THE COURT: Do you understand you have a right to appeal?

MR. POJILENKO: Yes.

THE COURT: You have to file that appeal within ten days. We'll give you an attorney free of charge to file it if you can't afford one. Do you understand?

MR. POJILENKO: Thank you.

THE COURT: Counsel, anything further?

MR. SLOMSKY: No, Your Honor.

MS. FOULKES: Nothing further.

THE COURT: Recess.

(Matter concluded at 3:57 p.m.)

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

06-1354

UNITED STATES OF AMERICA

v.

EVGUENI POJILENKO
a/k/a
EUGENE
a/k/a
ZHEKA
Evgueni Pojilenko,
Appellant

PRESENT: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, *Circuit Judges*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Theodore A. McKee
Circuit Judge

DATED: July 16, 2007
lwc/cc: Joel H. Slomsky, Esq. Andrea G. Foulkes, Esq.

FILED
DEC 28 2007
OFFICE OF THE CLERK
SUPREME COURT

No. 07-472

In the Supreme Court of the United States

EVGUENI POJILENKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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EVGUENI POJILENKO, PETITIONER

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

Petitioner contends that the standards applied by the court of appeals in reviewing his above-Guidelines sentence for unreasonableness are inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005). On June 11, 2007, this Court granted certiorari in *Gall* v. *United States*, No. 06-7949, to address the standards to be applied in reviewing a sentence outside the Guidelines for unreasonableness under *Booker*. Accordingly, the petition for a writ of certiorari should be held pending the Court's resolution of *Gall*, and then disposed of as appropriate in light of the decision in that case.*

* The government waives any further response to the petition unless this Court requests otherwise.

Respectfully Submitted.

PAUL D. CLEMENT
Solicitor General

OCTOBER 2007